

Certain principles to be applied in relation to Order 14 have been laid down in the cases listed at the head of this judgment. They appear in the notes to Order 14 in the White Book, 1961.

These principles appear to have been summarised and finally clarified by the House of Lords in *Jacobs v. Booth's Distillery Company* (19). It was there laid down that:

"The proper view to be taken of Order XIV is that the tribunal to which the application is made should simply determine, 'Is there a triable issue to go before a jury or a court?' It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, 'You have no defence.'"

In my view it was a correct application of these principles in the light of section 71 to enter summary judgment for the plaintiff.

The defendant company was insured with the Peoples Insurance Company of Singapore and it appears from the record that there was some arrangement between the parties and the Insurance Company for the latter to pay for repairs, etc., done by the plaintiff to the defendant company's lorries. The correspondence shews that when certain bills were rendered to the Insurance Company by the plaintiff payment was refused on the ground that no report of any accident had been made by the defendant company. Much was made of this by defendant's counsel before Azmi J. but whatever the contractual position may be between the defendant and the Insurance Company, I cannot see how it can affect the liability of the defendant company to pay the plaintiff for work done, etc., under section 71 of the Contracts Ordinance.

The only case which I have been able to find that gives any assistance on this aspect of the matter is *Thorne v. Seel* (11). The report is short and I set it out in full.

"Rules of Court, 1875, Order XIV — Leave to defend — Claim of Defendants to be indemnified by Third Party.

Appeal of the defendant from the decision of Mellor and Field JJ.

The Common Pleas Division had ordered that plaintiff should be at liberty to sign judgment upon a contract pursuant to Order XIV. It appeared upon the affidavits that the only defence suggested was, that the defendant ought to have been indemnified by one Gascoyne against the plaintiff's claim.

Sydney Wolfe, for the defendant, in support of the appeal.

Kenneth E. Digby, for the plaintiff, was not called upon to argue.

The Court (Bramwell, Brett, and Cotton L.J.J.) dismissed the appeal.

Bramwell L.J. said that although the powers conferred by Order XIV, ought to be used cautiously, in the present case the affidavits disclosed no defence.

Brett L.J. said that the defendant ought not to be allowed to defend, unless he could prove that Gascoyne had actually discharged the plaintiff's claim by payment. The defendant had not sworn to any facts entitling him to defend, nor even to any hearsay evidence from which an inference could be drawn in his favour; he had not shewn any plausible ground of defence.

Cotton L.J. said that the defendant had not deposed to statements upon hearsay, which, if proved by proper evidence at the trial, might entitle him to judgment there was no probable or plausible ground for defences.

A The only ground suggested was the existence of a cross-claim by the defendant against Gascoyne; but as the plaintiff had a valid claim, the defendant ought not to be assisted by the Court."

It would therefore appear that the defendant's remedy lies against the Peoples Insurance Company.

B There is one final aspect of this matter with which it is necessary to deal. There had been two bites at this cherry, Azmi J. having struck out on technical grounds a previous application by the plaintiff.

C When the matter came before the learned judge for the second time the excessiveness of the bills was raised by the defence. Azmi J. stated that "it was obvious that this point was added in the new affidavit and I regarded this with grave suspicion." The learned judge's view may indeed be the right one, but in the interval between hearings the defence could have had the time to go into the accounts in detail and the point may have been genuinely taken, I think therefore that they should be given the opportunity to be heard on this question.

D Except therefore on the question of the excessiveness of the bills, which I think should be referred back to the learned trial judge, I would dismiss this appeal. As the respondent has succeeded on the main issue I think he should have the costs of this appeal and that the deposit should be paid out to him.

E Good J.A.: I have had the benefit of reading the judgments of the learned Chief Justice and Mr. Justice Hill with which I agree. I too would dismiss the appeal and make the same order as to costs.

Appeal dismissed.

Solicitors: *Braddell & Ramani; Maxwell, Kenion, Cowdy & Jones.*

G JAG SINGH v. TOONG FONG OMNIBUS CO. LTD.

[C.A. (Thomson C.J., Hill and Good J.J.A.)
May 17, 1962]

[K.L. — F.M. Civil Appeal No. 45 of 1961]

H *Damages — Personal injury — School boy — Loss of leg — Contributory negligence — Costs — Whether can be apportioned.*

Practice and Procedure — Costs — Contributory negligence — Apportionment — Observation on discretion.

I The plaintiff, a schoolboy of 7 years, was knocked down and injured by the defendant's double decker omnibus as a result of which his right leg had to be amputated. He claimed that the accident was due to the negligent driving of the bus driver and sued for general and special damages. Suffian J. held that the bus driver was negligent but that there was contributory negligence on the part of the plaintiff which he assessed at 50%. He thus awarded the plaintiff \$7,890 as general and special damages and half his taxed costs. The plaintiff now appealed against the finding of the trial judge of contributory negligence, the amount of general damages and against the order depriving him of half his costs.

Held: (1) the trial judge's findings should not be interfered. A child who had sufficient discretion to travel to and from school should have sufficient discretion to appreciate that it is a dangerous thing to get in the way of a moving omnibus;

(2) in all the circumstances of this case and having regard to the authorities particularly *Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai* (2) it was not open to the Court to interfere with the trial judge's assessment;

(3) the learned trial judge was wrong in apportioning the costs as he did, thereby depriving the plaintiff of half his costs.

Decision of Suffian J. (pp. 78 and 122, *supra*) varied.

Observations on standardisation and assessment of damages.

Cases referred to:—

- (1) *British Fame v. Macgregor* [1943] A.C. 197, 201.
- (2) *Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai* [1962] M.L.J. 29.
- (3) *Flint v. Lovell* [1935] 1 K.B. 354.
- (4) *Bird v. Cocking & Sons Ltd.* [1951] 2 T.L.R. 1260.
- (5) *Scott v. Musial* [1959] 2 Q.B. 429.
- (6) *Waldon v. The War Office* [1956] 1 All E.R. 108.
- (7) *Bastow v. Bagley & Co. Ltd.* [1961] 1 W.L.R. 1494.
- (8) *Phillips v. South Western Railway Co.* (1878-79) 4 Q.B.D. 406.
- (9) *Low Ah Tow v. Yusof bin Kayab* [1954] M.L.J. 112.
- (10) *Drennan v. Greer* [1957] M.L.J. 77.
- (11) *Lee Sai Chong v. Wan Lim Cheong* [1962] M.L.J. 259.
- (12) *Loughran v. Armstrong* [1956] M.L.J. 137, C.A.

COURT OF APPEAL.

Denis Murphy for the appellant.

M. Edgar for the respondents.

Cur. Adv. Vult.

Thomson C.J.: This appeal arises from a running down case which was tried by Suffian J. at Kuala Lumpur. The plaintiff is a child who at the time of the incident from which the case arose was about 7 years of age and he sued by his father as his next friend.

On 13th November, 1959, the plaintiff was knocked down by a large omnibus of the double-decker type belonging to the defendant company and suffered injuries in consequence of which his right leg had to be amputated above the knee. He claimed that the accident was due to the negligent driving of the bus driver and sued for general damages for pain and suffering and so forth and for \$780 special damages, being hospital expenses and the cost of an artificial leg.

Suffian J. found that there was negligence on the part of the driver, but that there was also contributory negligence on the part of the plaintiff which he assessed at 50%. He assessed the special damages at the amount claimed, \$780, and the general damages at \$15,000 but by reason of his finding of contributory negligence held that these sums should be reduced by one half. Judgment was accordingly entered for \$7,890

A and the plaintiff was awarded half his taxed costs.

Against that judgment the plaintiff has now appealed. He has appealed against the finding of contributory negligence, against the amount awarded as general damages as being inadequate and, by leave, against the order depriving him of half his costs.

The accident occurred at a bus station on one of the lanes of a somewhat complicated "roundabout" which leads from Pudu Road to Sultan Street and Cross Street, a part of the town where road traffic is always heavy and particularly so in the morning and early evening when people are going to and returning from work. On this lane traffic is permitted to travel one way only and on the left side of it, which is the near side of traffic using it, there is a sort of bay set back about 18 feet from the main portion of the roadway. On its outer aspect this bay is lined with shelters for the convenience of waiting passengers and just opposite the first shelter and 17½ feet from it there is a lamp post. This is almost exactly on an imaginary line which would be the outer limit of the roadway if there was no bay.

There would seem to be little controversy as to what actually happened. About 6 p.m., when it was still broad daylight, the plaintiff and a number of other school children were in the shelters at the bus station waiting for a bus. Apparently, they were in the habit of waiting at the same place for a bus about the same time everyday. The defendants' bus approached and the driver said it was his intention to leave the lamp post on his near side and then draw in to the shelters to pick up passengers, although it would appear that buses do not always pull in to the shelters but sometimes stop at the lamp post to pick up their passengers if traffic conditions demand such a course. As the bus approached, the children came out from the shelters to intercept it at the lamp post. Whether they intended to board it while in motion or whether they thought it was going to stop at the lamp post is by no means clear. Be that as it may, the plaintiff went beyond the base of the lamp post into the main portion of the roadway and came in contact with the near side front of the moving bus. At that time, according to measurements later taken by the Police, the near side of the bus was 2 feet from the lamp post and it could not have been going very fast because a blood mark found at the scene suggested that it had pulled up within 9 feet after striking the plaintiff. It did, however, strike the plaintiff and caused injuries to his leg, although it probably did not actually pass over the leg. In the event the leg had to be amputated above the knee.

On that the trial Judge found that there was negligence on the part of the driver. He also found, and here he reminded himself that he was dealing with a young child, that the plaintiff was himself negligent in going beyond the lamp post into the path of the approaching bus and he

assessed the extent to which the plaintiff's negligence contributed to the accident at one half. A

There has been no appeal against the finding of negligence on the part of the driver.

The plaintiff has appealed against the finding of contributory negligence. It has, however, been conceded on his behalf that that part of his appeal has little prospect of success. As was said by Lord Wright in the case of *British Fame v. Macgregor* ⁽¹⁾ :—

"It would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and the facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge's apportionment."

What the plaintiff did here would clearly have been careless in the case of an adult. The learned Judge was well aware he was dealing with a child of tender years and for myself, in the absence of anything to the contrary in the evidence, I should be reluctant to say that a child who had sufficient discretion to travel to and from school had not sufficient discretion to appreciate that it is a rash and dangerous thing to get in the way of a moving omnibus.

The real matter of substance in the appeal is the question of the quantum of damage. I do not, however, think it is necessary to deal with that question at length for a great deal of what was said just over six months ago by this Court in the case of *Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai* ⁽²⁾ is applicable here. In that case, as regards the limits which should bind a Court of Appeal in dealing with questions of this nature, we based ourselves on the cases of *Flint v. Lovell* ⁽³⁾, *Bird v. Cocking & Sons Ltd.* ⁽⁴⁾ and *Scott v. Musial* ⁽⁵⁾. As regards the consideration of awards for similar cases we accepted the views expressed by Birkett L.J. in the case of *Bird v. Cocking & Sons Ltd.*, *supra*, and Singleton L.J. in the case of *Waldon v. The War Office* ⁽⁶⁾, which I do not propose to repeat here. We took the view that by reason of differences in oecological conditions a consideration of awards in English and Scottish cases is not calculated to produce very useful results in this country and with regard to such local cases as are reported we went on to express the view that in any event these "are so few in number and so diverse in their conclusions that they cannot afford any very reliable guidance".

The only reported case which has been cited to us here which was not cited in the case of *Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai*, *supra*, is that of *Bastow v. Bagley & Co. Ltd.* ⁽⁷⁾ which was not decided until a few days after judgment was given in the former case.

What happened in that case was that the plaintiff had been awarded £1,150 general damages for the loss of an eye. The Court of Appeal held that that sum was lower than they would themselves have awarded, but that it was not a case in which they should interfere. Two days later another division of the Court awarded £2,000 damages for the loss of an eye, in broadly similar circumstances, to a plaintiff who had been awarded £850 by the trial Judge. The first appeal was restored to the list for hearing and it was held that the disparity between the award of £2,000 in the second appeal and that of £1,150 in the case before the Court was too great to be just and fair to the plaintiff in all the circumstances. Having regard to the fact that the first appellant's position was somewhat better than the second one he was awarded £1,800. On the second occasion on which the case was before the Court Sellers L.J. said:—

"In the present case the trial judge's award was £1,150, and having regard to established principles which guide this court in reviewing damages it left a doubt in the court's mind whether it would be proper to disturb it, but as three of our brethren in the other division have assessed the damages for the loss of an eye in their case at £2,000 we are now satisfied that the disparity between that and the award here under review is too great to be just and fair to the plaintiff in all the circumstances."

Upjohn L.J. agreed. Diplock L.J. also agreed and said:—

"What can be said, however, if justice is to be done as between one victim and another and one tortfeasor and another, is that when all proper allowance has been made for what may be widely differing circumstances of the individual victims, the sum awarded to one should not be out of all proportion to the sum awarded to another in respect of similar physical injuries."

When this case was first argued, I expressed my own view that it was very close to the borderline at which an appellate court feels entitled to interfere with an estimate of damages made by a very experienced judge who had seen the victim and formed an obviously careful opinion as to the extent to which he, as an individual, would be handicapped by the disability of monocular vision. In the light of the almost contemporaneous award of £2,000 by another division of this court for a very similar injury to a plaintiff in broadly similar circumstances to those of the plaintiff in this case, I, like my Lords, have reached the conclusion that I was mistaken, and that the present case, although borderline, is nevertheless one in which we can and should interfere with the award made by the trial judge."

For myself I do not think this case detracts in any way from anything that has been said on the subject previously and in any event it must be considered in the light of its own special

circumstances. It is clear that from the beginning the Court thought that the original award of £1,150 was too low. Sellers L.J. said that that figure was less than he would himself have awarded for the injury and, though he was compelled by authority to dismiss the appeal, he did so "with some regret". Diplock L.J. said:—

"I agree. I think that the damages here were low, and very close to the borderline at which the court would feel entitled to interfere; but, for the reasons given by Sellers L.J. I think that 'very close' is not the right test."

On re-consideration the Court increased the award to £1,800. That, it is to be presumed, is the award they originally had in mind as being suitable and it is to be noted that it represents an increase of 55% on the amount awarded by the trial Judge.

In the present case the trial Judge commenced his examination of the question of general damages with the case of *Phillips v. South Western Railway* ⁽⁸⁾ and then expressed his views as to the case before him as follows:—

"In attempting to place the plaintiff in so far as can be done by money in the same position as he would have been in but for the negligence of the defendant's driver, I am seriously handicapped by the fact that at the time of the accident the plaintiff was only seven years of age and was not a working man earning money. His injuries were serious, his pain and suffering excruciating. Because of the amputation his mobility has been seriously affected, but not his mental capacity and if he does well at school there is nothing to stop him from earning a living in a sedentary occupation or even from achieving eminence in the profession or politics. Nevertheless, I take into account the probability that he might not have the mental equipment necessary for these positions, in which event his lack of mobility would be a serious handicap to his future livelihood. Considering all these factors and considering the social class to which the plaintiff belongs (his father is a watchman who sends two of his sons to an English school) and giving this matter the best consideration I can, in the circumstances, award \$7,500 general damages, that is, half the damages I would have awarded for 100% liability."

For myself, I agree with this course of reasoning. I think on the whole that if I had been trying the case I should, had there been no question of contributory negligence, have assessed the damages at a little more, something in the neighbourhood of \$18,000 but certainly less than \$20,000. And it cannot be said that such an award, although it might be less than sums awarded in other cases by individual Judges in similar but not necessarily identical circumstances, would be very much out of keeping with anything that has been said in the past by this Court, particularly when it is remembered that in the present case there was nothing to suggest that the injured boy had in fact suffered or would necessarily suffer any diminution of earning capacity by reason of his injury. In *Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai*, *supra*, we did not interfere with an award of \$25,000 in respect of the loss of an arm by a young adult, but \$13,500 of that amount was given in respect of loss of earning capacity. In the case of *Low Ah Tow v. Yusof bin Kayab* ⁽⁹⁾ the Singapore Court of Appeal, of which the then Chief Justice of the Federation was a member, upheld an award of \$24,000 to a young

A adult who had suffered a permanent disability of his leg, although they considered the damages on the high side. Of that award, however, \$9,000 was in respect of loss of earning capacity. In the somewhat controversial case of *Drennan v. Greer* ⁽¹⁰⁾ this Court upheld an award of \$35,000 in respect of loss of mobility of a leg. There, again, the injured person was a young man of settled habits and the trial Judge had found there was some loss of earning capacity, although he did not specifically allocate any part of his award to this head.

In all the circumstances of the case and having regard to the authorities I do not think it is open to this Court to interfere with the trial Judge's assessment.

With regard to the question of costs, I think the learned trial Judge was wrong in apportioning the costs as he did and thereby depriving the plaintiff of half his costs. Costs, of course, is a matter which is in the discretion of the Court. That discretion must, however, be exercised judicially and the normal rule is that costs follow the event. In the present case there was no payment into Court which meant the plaintiff had to go on with the case to get anything at all. It is true that he failed on the issue of contributory negligence, but the investigation of that issue did not increase the costs in any way, for, once negligence was denied and on this, of course, the defendants failed, all the facts had to be gone into.

In the circumstances I would dismiss the appeal with costs except that I would vary the order of the Court below regarding costs so as to give the plaintiff his full taxed costs.

Hill J.A.: I have had the advantage of reading the judgments of the learned Chief Justice and my learned brother Good. With these judgments I respectfully agree. It would be superfluous for me to add anything thereto.

Good J.A.: I have had the benefit of reading the judgment of the learned Chief Justice, with which I agree. My additional observations are confined to the quantum of damages.

In a recent appeal, *Lee Sai Chong v. Wan Lim Cheong* ⁽¹¹⁾, Administrator of the Estate of Wan Thai Thong, infant, deceased, in which this Court had to consider the quantum of damages for loss of expectation of life, the learned Chief Justice in his judgment dealt with the difficulties with which Judges are faced, when they have to assess damages under that head, in attempting to find a monetary equivalent for the loss of the balance of enjoyment to which the deceased might have looked forward if his life had not been cut short.

In cases where the negligent act has resulted in personal injury, particularly if the disability is permanent, the difficulty of equating the injury and its consequences with a sum of money is almost as great as that which has to be resolved in fatal accident cases. It is an anxious and often distressing but always necessary task

for Judges to have to answer the question, "How much for an eye?" — to quote a headline which appeared recently in the *Times* over a report of the case of *Bastow v. Bagley & Co. Ltd.* ⁽⁷⁾ — or to assess the value of a limb removed from the living body of the injured party.

Many factors have to be taken into consideration (though they may not all arise in a single case); pain and suffering, much reduced by modern drugs, anaesthetics and surgical techniques; disfigurement, and consequent social embarrassment, more serious probably for a woman than for a man and for a young girl than for an elderly woman; loss of actual earnings; impairment of potential earning capacity, depending to a large extent on the plaintiff's education, social and economic background and intellect, and almost incalculable in the case of a young person whose potential is as yet unknown; and loss of amenity, which varies with the individual's tastes and abilities.

I mention these considerations not for the purpose of attempting to establish any general principles but merely to demonstrate the number and variety of the combinations of circumstances which may occur. When they are considered and weighed by individual Judges there are bound to be differences in the results, some judges placing more weight on this factor and others on that and all judges being at liberty to do so provided they do not manifestly depart from a reasonable sense of proportion. That, I think, is the answer to Mr. Murphy's constantly reiterated plea for standardisation of damages. It also suggests that the practice of assessing damages in one case by reference to the damages awarded in similar cases must be followed with caution, for the circumstances which may have to be taken into consideration are so numerous and so variable that an apparent analogy can too often turn out to be a fallacy.

There are, however, certain principles, based not on law but on what I hope is common sense, which appear to me to be of general application.

In the first place, it seems to me that a person born with a limb missing will be less handicapped in life than a person who loses a limb at some time in the course of his life, because he will be better adjusted, both physically and psychologically, to his handicap than the person who has to make the adjustments later. It follows that if a new-born child loses a limb through the negligence of another the quantum of damages should be less than if he were a youth or an adult. Similarly, though not perhaps to the same extent, a young child is in a better position than a grown-up person because he can so adjust his life as to reduce the effect of the handicap. An elderly person's loss may not be so serious as that of a youth or a young or middle-aged adult because he has less to lose; his way of life will have tended to become sedentary in the normal course of events.

In the second place, as Sir Charles Murray-Ainsley C.J., Singapore, pointed out in *Low Ah*

A *Tow's* case (to which I shall refer again later), the gravity of the loss varies with the trade or profession and the personal interests of the injured party: a barrister or an accountant may be less incommoded by the loss of a leg than the loss of an eye, or a surgeon or a craftsman by the loss of a leg or an eye than the loss of an arm. These examples can be multiplied *ad infinitum*.

B Thirdly, new skills in the making of artificial limbs and new techniques in therapeutic training can give to limbless persons a useful and enjoyable life in many spheres of activity and even in the field of sport.

C Fourthly, a child who receives substantial damages for the loss of an arm or a leg will, if the money is prudently invested and sensibly employed, be able to train himself for a profession or other more or less lucrative sedentary occupation.

D In the present appeal we are asked to say that a sum of \$15,000 is inadequate compensation for a boy of 9 or 10 who was 7 years old when the cause of action arose and whose leg has been amputated above the knee. Mr. Murphy referred us to a number of cases for the purpose of comparison. The local cases which went to the Court of Appeal in the Federation or Singapore, on which I have made brief notes of the relevant facts, are as follows:

- E (1) *Low Ah Tow v. Yusof bin Kayab* ⁽⁹⁾ (C.A., Singapore), Lorry driver, aged 23, injury to right leg and hip, substantial permanent disability, \$24,000. *Held*: Damages on the high side but no ground for interference.
- F (2) *Loughran v. Armstrong* ⁽¹²⁾ (C.A., Singapore). Young woman, age not stated, damaged foot, permanent disability negligible. Damages \$7,500 reduced to \$4,000.
- G (3) *Drennan v. Greer* ⁽¹⁰⁾ (C.A., Federation of Malaya), Insurance representative, aged 39, left leg shortened 2½", substantial permanent disability, \$35,000. *Held*: Damages on the high side but not so wrong as to justify interference.
- H (4) *Pahang Lin Siong Motor Co. Ltd. & Anor. v. Cheong Swee Khai & Anor.* ⁽²⁾ (C.A., Federation of Malaya). Male rubber tapper, aged 20, amputation of right arm. \$25,000. *Held*: Damages may have been too generous but the award was not a wholly erroneous estimate of the damage suffered.

I Speaking for myself, I do not know what comparison is to be drawn between the loss of a 7-year old schoolboy's leg and the various injuries sustained by adults in the cases mentioned. I cannot help thinking, with all respect to Mr. Murphy's industry and persuasiveness, that a comparison of the present case with those other cases gives us very little help. If those cases demonstrate anything that can be regarded as being of general application, they demonstrate the extreme reluctance of the Court of Appeal to interfere with the trial Judge's discretion even

where the members of the Court thought that the damages awarded were not what they themselves would have given if they had been trying the case. It will be observed that the only case in which the Court of Appeal altered the amount of the award was where the permanent disability was negligible.

In the present case I find myself in a position similar to that of the Court of Appeal in *Loughran v. Armstrong*, *Drennan v. Greer* and *Pahang Lin Siong Motor Co. Ltd. & Anor. v. Cheong Swee Khai & Anor.*, except that in those cases the damages were thought to be on the high side, while the sum awarded here seems to me to be on the low side. At the risk of appearing to be wise after the event, I do not think that \$15,000 is the amount I would have awarded. I feel sure that I would have awarded more, but not a great deal more. On the other hand I am not, as was said by Morris L.J. in *Scott v. Musial* ⁽⁶⁾:

"satisfied that the Judge has made a wholly erroneous estimate of the damage suffered." nor do I feel disposed to say, adapting the words of Diplock L.J. in *Bastow v. Bagley & Co. Ltd.* ⁽⁷⁾, that the sum awarded is one which is out of all proportion to the sum awarded to others in respect of similar physical injuries.

For these reasons I would dismiss the appeal as regards the quantum of damages.

I do not wish to say anything on the question of contribution and costs, as to which I agree with what has been said by the learned Chief Justice.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; Bannon & Bailey.*

KIAW AIK HANG CO. LTD. v. PUBLIC PROSECUTOR

[O. Cr. J. (Adams J.) May 17, 1962]

[Muar — Originating Motions Nos. 4 and 5 of 1962]

Criminal Law and Procedure — Forfeiture of vehicle under s.92, Road Traffic Ordinance, 1958 — Hearing of owner — Finance Company's proper course — Criminal Procedure Code (Cap. 6), s.323.

Where the forfeiture of a vehicle is under section 92 of the Road Traffic Ordinance, 1958 a finance company's proper course would be to ask the judge to call for all the record under section 323 of the Criminal Procedure Code and to enquire into the propriety of the order of forfeiture on the ground that the finance company and not the defendant to the summons was the true owner of the vehicle which had been forfeited without a chance for them to be heard.

A Magistrate before ordering forfeiture under section 92(4) of the Road Traffic Ordinance should enquire as to whether the defendant is in fact the true owner of the vehicle or whether the vehicle is the subject of a hire-purchase agreement. If it transpires that the vehicle is the subject matter of a hire-purchase agreement, notice should be served on the finance company calling upon them to show cause as to why the vehicle should not be forfeited under section 92(4) and he should hear argument before deciding whether the vehicle should be forfeited or released.

ORIGINATING SUMMONS.

S. K. Lee for the applicants.

Hamzah bin Dato' Abu Samah (Deputy Public Prosecutor) for the respondent.

Adams J.: These were two applications by Motion under section 410 of the Criminal Procedure Code by a finance company who were the owners of two motor cars ordered by the learned Magistrate, Segamat, to be forfeited apparently under the provisions of section 92 of the Road Traffic Ordinance (No. 49 of 1958). But it transpires from the record that the two vehicles had not been seized under section 92(2) prior to the hearing of the summons. This is a prerequisite of any order of forfeiture under section 92(4). I would draw attention to the fact that section 410 of the Criminal Procedure Code only applies to cases where there has been an order of forfeiture under section 407 of the Criminal Procedure Code and does not apply generally to forfeitures made under the provisions of other statutes.

If the Magistrate purported to be acting under section 407 of the Criminal Procedure Code, his order of forfeiture was also unlawful as under section 407 an order of forfeiture can only be made in respect to property produced before the Court. The motor cars were not before the Court at the time the orders were made and were not in fact seized until the day following the conclusion of the case.

It would seem to me that in cases of this sort where the forfeiture is under section 92 of the Road Traffic Ordinance a finance company's proper course would be to ask the Judge to call for the record under section 323 of the Criminal Procedure Code and to enquire into the propriety of the order of forfeiture on the ground that the finance company and not the defendant to the summons was the true owner of the vehicle which had been forfeited without a chance for them to be heard.

It would also seem to me that Magistrates before ordering forfeiture under section 92(4) should enquire as to whether the defendant is in fact the true owner of the vehicle or whether the vehicle is the subject of a hire-purchase agreement. If it transpires that the vehicle is the subject matter of a hire-purchase agreement, notice should be served on the finance company calling upon them to show cause as to why the vehicle should not be forfeited under section 92(4) and he should hear argument before deciding whether the vehicle should be forfeited, or released.

I do not think that the procedure under section 410 was open to the applicants in the two cases before me, but it is clear from the records of the original proceedings that the seizures of the vehicles in both cases were illegal being made subsequent to the order of forfeiture. The order of forfeiture was, therefore, also illegal. On that ground only I consider that I should exercise my power of revision under section 325 of the Criminal Procedure Code and quash the order of forfeiture in both cases.

Order of forfeiture quashed.